

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ERIC HUBBARD,

Defendant-Appellant.

UNPUBLISHED

November 22, 2011

No. 299485

Wayne Circuit Court

LC No. 10-001542-FC

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, for which he was sentenced to a prison term of 36 months to 15 years. He appeals as of right. We affirm.

Defendant was convicted of participating in an armed robbery in the parking lot of an apartment complex. Three witnesses identified defendant as one of the participants. Two of the witnesses had previously identified defendant in a photo array.

Defendant argues on appeal that trial counsel was ineffective for failing to call an expert witness to support the defense theory of misidentification. In the absence of an evidentiary hearing, this Court's review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted).

The existing record does not show that defendant was denied the effective assistance of counsel. Trial counsel's decision to attack the witnesses' identification testimony by highlighting discrepancies through cross-examination and argument rather than present an expert witness was a matter of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). There is a strong presumption that counsel has employed an effective trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has the burden of affirmatively overcoming that presumption, and he has not overcome that presumption here. Rather, the record shows that defense counsel filed a Notice of Alibi Witnesses with the court and was granted a court ordered investigator, which suggest that defense counsel was pursuing

this strategy and tactically determined that it was unviable. Defendant has presented no evidence to the contrary.

In addition, because defendant has not presented any evidence showing what testimony an expert witness could have provided, he has not shown that he was prejudiced by the absence of the testimony. *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003). We also reject defendant's request for a remand for an evidentiary hearing on this issue.¹ Defendant has not supported his request with an affidavit or offer of proof regarding the facts to be established at a hearing. See MCR 7.211(C)(1)(a)(ii). Thus, he has not shown that an evidentiary hearing is necessary.

Defendant also argues that the prosecution failed to present sufficient evidence to identify him as a participant in the armed robbery. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The standard of review is deferential and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). A positive identification by a witness, or circumstantial evidence and reasonable inferences arising from it, may be sufficient to support a conviction of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999); *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

In this case, three eyewitnesses identified defendant as one of the perpetrators of the armed robbery. Two witnesses described the perpetrator as having a tattoo on his left hand, wearing jeans and a black hoodie; Defendant has a tattoo on his left hand. The same two witnesses picked the defendant out in a photo line-up, and both were 100 percent sure that

¹ This Court previously denied defendant's motion to remand for failure to persuade the Court of the necessity of a remand. *People v Hubbard*, unpublished order of the Court of Appeals, entered March 28, 2011 (Docket No. 299485).

Defendant was involved in the robbery. That testimony was sufficient to establish defendant's identity beyond a reasonable doubt. The credibility of the testimony was for the jury to resolve, and this Court will not resolve it anew. *Id.* at 699-700; *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause